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No. 97-1034

In The

Supreme Court of the United States

October Term, 1997

DANIEL E. CARPENTER,

Petitioner,

vs.

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PHILIP PIERCE
Counsel of Record
JAY D. FISCHER
ANDREW P. ROSS
FISCHER, WEISINGER, CALIGUIRE
PORTER & PIERCE
Attorneys for Respondents
310 Madison Avenue
New York, New York 10016
(212) 545-1921

144269

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Where parties to actions that are pending simultaneously in both state and federal courts, involving the same claims, stipulate to dismiss the state court action "with prejudice as to defendant" (petitioner herein); and where the state court plaintiffs (respondents) assert that the intent of the parties was to continue their litigation in one forum, *i.e.*, the federal court, and the petitioner, without objection, continues for twenty months to actively litigate the federal court action, has the petitioner waived his right to assert a belated *res judicata* defense based on the state court stipulation, under the doctrine of "acquiescence" as set forth in *Calderon Rosado v. General Electric Circuit Breakers*, 805 F.2d 1085 (1st Cir. 1986)?

2. On the above facts, should the federal court examine the state court stipulation at issue by applying the laws of that state, *i.e.*, under Massachusetts principles of contract law?

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COUNTER STATEMENT OF THE FACTS

Respondents commenced their Massachusetts state court action against Petitioner in February, 1993. Petitioner commenced the New York federal action against Respondents and others one month later, in March, 1993. Respondents brought a third party action against Petitioner in the federal action setting forth the same theories of liability they had asserted in the Massachusetts state court action. The parties entered into the Massachusetts state court stipulation of dismissal here at issue, in August, 1993. Between March, 1993 and August 1993 Petitioner raised no formal objections to the fact that dual proceedings based on the same transactions were simultaneously occurring in Massachusetts state court and New York Federal Court.

During the months preceding and leading up to the filing of the Massachusetts stipulation of dismissal, the Massachusetts attorney for Respondents and Petitioner's attorney met several times, in and out of court, and agreed during those meetings that Respondents would discontinue their Massachusetts court action against Petitioner and continue with their New York third party action against Petitioner. The attorneys made this agreement for the purpose of having all claims against Petitioner proceed in one forum, instead of two. The attorneys specifically contemplated and agreed that Respondents' third party action against Petitioner in the New York Federal Court would continue.

Although Petitioner represents to this Court (in the fourth paragraph of his Statement of Facts) that the First Federal Case (of Two) "languish[ed] on the docket of the District Court for some 20 more months, as the case was transferred between and among several District Court judges before finally coming to rest before a magistrate judge", and that "during this 20 month

hiatus, there was no activity in the case as between Israel and Carpenter" the Court of Appeals, in its decision, made a directly contrary finding regarding the activity of the case during the 20 month period. The Court of Appeals stated in its decision:

> Carpenter argues that the First Southern district Action was *not* in fact actively litigated during most of the 20-month period following dismissal of the Massachusetts Action, and that he therefore was not required to assert his res judicata defense during that period. Appellee's Brief at 10 (arguing that "nothing was happening in the case as it was transferred" among Southern District judges). But the record shows that litigation *did* continue in the First Southern district Action after entry of the Massachusetts stipulation, including responsive pleadings (relating to a fourth-party complaint), further discovery, and a motion for summary judgment by Israel that the district court decided without Carpenter raising the issue of res judicata.

(Appendix A to the Petition at 11a-12a (n.3)).

Hence, the Court of Appeals found that substantial activity occurred in the First Federal Case directly following the signing of the Massachusetts Stipulation of Dismissal. During the twenty month period between the time of the filing of the Stipulation of Dismissal in the Massachusetts action and Magistrate Judge Francis's decision to decline jurisdiction over the state law claims brought against Petitioner in the First Federal Action, Petitioner never raised an issue of *res judicata*, never sought leave to amend the Third Party Answer to include the defense of *res judicata*, and never moved for summary judgment, in that action, based on *res judicata*. Petitioner can be said, therefore, to have never "objected" on the grounds of *res judicata* to the continuance of the First Federal Court Action.

The Court of Appeals held that the Stipulation of Dismissal was ambiguous and that under Massachusetts law the court was permitted to look behind the Stipulation to interpret it. The court reinstated Magistrate Judge Francis's original decision (May 15, 1996) denying Petitioner Carpenter summary judgment on the issue of *res judicata*, and remanded the case to the District Court.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS MADE A REASONABLE AND APPROPRIATE CONSTRUCTION OF MASSACHUSETTS LAW. THE UNITED STATES SUPREME COURT HAS TRADITIONALLY DECLINED TO HEAR CASES CHALLENGING A COURT OF APPEALS' REASONABLE CONSTRUCTION OF STATE LAW.

The Court of Appeals determined here that Massachusetts applies principles of contract law to the interpretation of Stipulations such as the one here. (Appendix A to the Petition at 12a). Specifically, citing *ITT Corp. v. LTX Corp.*, 926 F.2d 1258, 1264 (1st Cir. 1991), the court held that under Massachusetts law, applying contract principles, the court is first bound to decide if the clause at issue in the stipulation has a plain meaning or if it is ambiguous. The Court of Appeals held that the court should, in making this decision, assess the clause at issue in the light of all the other language contained in the stipulation, as well as in the light of the circumstances under which the parties reached the agreement/stipulation. (Appendix A to the Petition at 12a-13a).

The Court of Appeals, using these guidelines, found that the clause at issue in the subject Stipulation here was "susceptible

of 'two reasonable' interpretations" and reinstated Magistrate Judge Francis's May 15, 1996 decision which denied Petitioner Carpenter summary judgment on the issue of *res judicata*.

The Court of Appeals's construction of Massachusetts law here was a reasonable one. "It is [the Supreme Court's] practice to accept a reasonable construction of state law by the court of appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion'." *Haring v. Prosise*, 462 U.S. 306, 314, 103 S. Ct. 2369, 2373, 76 L. Ed. 2d 595 (1983) citing *Bishop v. Wood*, 426 U.S. 341, 346, 96 S. Ct. 2074, 2078, 48 L. Ed. 2d 684 (1976). ". . . Standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, *supra*.

Hence, because the Court of Appeals reasonably construed the relevant Massachusetts law, the Supreme Court should decline to accept this case.

II.

THERE IS NO CONFLICT BETWEEN THIS COURT OF APPEALS DECISION AND OTHER CIRCUITS' DECISIONS, OR BETWEEN THIS DECISION AND OTHER DECISIONS WHICH THE SECOND CIRCUIT HAS RENDERED.

The significant difference between all of the cases which Petitioner cites in Point I (beginning at page 9) of his Petition and this case is that in this case there was a parallel and simultaneous action involving identical causes of action occurring in another forum (*i.e.* in the Federal Court, hereinafter "Forum #2") when the parties stipulated to Dismiss; and the party now seeking to apply *res judicata* principles to the parallel

case made no objection to the maintenance of parallel cases for six months, or to the continuation of the Federal case for one and one half years after signing the Stipulation of Dismissal terminating the case in the Massachusetts state court (hereinafter "Forum #1"). Federal Law and the Restatement have recognized that this crucial factual difference between this case and the ones Petitioner cites in his Point I affects the application of *res judicata* principles. *See Calderon Rosado v. General Elec. Circuit Breakers*, 805 F.2d 1085 (1st Cir. 1986); Restatement of Judgments 2d § 26(a)(1); *Moore's Federal Practice* § 131.24(1). *See also Carmichael v. Adirondack Bottled Gas Corporation of Vermont*, 635 A.2d 1211 (Vt. 1993). None of the cases which Petitioner cites under Point I of the Petition contain similar facts. All involve cases where after signing a stipulation of dismissal the plaintiff attempted to commence a **new** case.

A similar sequence of events to the ones in the instant case occurred in *Calderon Rosado, supra.* In *Calderon Rosado, supra*, after his employer terminated him for what he believed to be legally unfair reasons, the plaintiff commenced an action based on the unfair firing in a Puerto Rico commonwealth trial court. Three months later he commenced an action based on the same transaction — the illegal firing — in Federal Court. Several months after filing his federal suit, plaintiff moved to have the Puerto Rico trial court suit dismissed in order to be able to proceed in the Federal Court only, (that is, be made to have his claims proceed in one forum as opposed to two). Plaintiff wanted to proceed in Federal Court because he believed the remedies available there were more beneficial to him then those available in the Puerto Rico commonwealth court proceeding.

Defendants concurred in the idea of proceeding in one forum instead of two and expressed that it would benefit them as well. Defendants insisted that plaintiff sign a stipulation that

read that the Puerto Rico court action was dismissed "with prejudice." Before the plaintiff and defendant actually signed a stipulation reading such, they clearly communicated and understood that they were agreeing to dismiss the Puerto Rican trial court action and that plaintiff would be barred from asserting the theory of liability pled in that case, in the Puerto Rican commonwealth courts *only*, ever again. Before signing the stipulation, plaintiff and defendant also clearly communicated and understood that they were agreeing to allow the plaintiff to continue the Federal Court action after dismissing the Puerto Rican trial court action. The plaintiff and defendant then signed the stipulation.

The court, in *Calderon Rosado*, *supra*, found that it was clear that upon stipulating to dismiss the Puerto Rico trial court proceeding with prejudice, the plaintiff and defendant had in fact agreed that plaintiff would be forever barred from bringing his action again in the Puerto Rico commonwealth courts but that plaintiff could maintain his Federal Court action. *Calderon Rosado v. General Electric Circuit Breakers, Inc.*, 805 F.2d 1086, 1086 (1st Cir. 1986). Shortly after the plaintiff and defendant entered into the stipulation dismissing the Puerto Rico trial court action "with prejudice", the defendant moved in Federal Court for summary judgment claiming that the Stipulation in the Puerto Rico trial court had *res judicata* preclusive effect in the Federal Court action. The Federal trial court dismissed plaintiff's action finding that the stipulation had preclusive effect. On appeal, the Court of Appeals, citing the "acquiescence" rule of Restatement of Judgments 2d § 26(a)(1) held that the defendant's failure for three months to object to the dual actions, and acquiescence to plaintiff's desire to proceed in the Federal forum only, precluded the defendant from invoking *res judicata*. The court wrote:

> Nevertheless, we conclude that the ADEA action is not barred. This is because a recognized exception

> to the general rule prohibiting claim splitting is that if the parties agree, or a defendant implicitly assents, to a plaintiff splitting his claim, then a judgment in an earlier action which normally would bar the subsequent action will not. See *Restatement (Second) of Judgments §26(1)(a)* (1982) (normal *res judicata* rules do not apply if the "parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein"). And a defendant consents or acquiesces when he fails timely to object. . . . That is what happened here. While the two actions were pending against defendant, defendant did not complain that plaintiff was splitting his cause of action and forcing defendant to defend in two forums. And when plaintiff made it clear that he was voluntarily dismissing his section 185a action only because he intended to litigate his discharge in federal court, defendant did not object at all to this manner of proceeding. Rather, apparently agreeing that the ADEA litigation take place in federal court, defendant waited until after the dismissal before raising a claim splitting objection. That was too late.

Calderon Rosado v. General Electric Circuit Breakers, Inc., 805 F.2d 1085, 1086 (1st Cir. 1986).

Petitioner made no objection to dual claims proceeding in the two different forums for the six months between the time Respondent asserted their claims against Petitioner in the Federal action and the time the parties filed the Massachusetts state court Stipulation of Dismissal. Petitioner similarly failed to object for twenty months after the date the parties filed the Massachusetts stipulation to the continuance of the New York federal action. On these facts, applying the concept of *Calderon Rosado v. General Electric Circuit Breakers, Inc.* 805 F.2d 1085

(1st Cir. 1986), Petitioner is estopped from asserting *res judicata* with respect to the Federal Court action.[1]

Since the *Calderon Rosado, supra*, and Restatement rule's primary intent is to protect a defendant from the harassment of multiple actions, it is a rule whose principle logically extends to the facts of this case.

Moore's Federal Practice states:

> One of the primary purposes of the claim preclusion doctrine is to protect a defendant from being harassed by repetitive actions based on the same claim. This

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1. The Court should note that Petitioner is seeking to have the Court dismiss Respondent's 1995 action which Respondent commenced in New York State Court and which Petitioner removed to the District Court for the Southern District of New York. As Petitioner set forth in his petition, Respondent commenced the 1995 action one day following the Southern District Court's dismissal of Petitioner's action against Respondent which Petitioner commenced in March, 1993. In that action, Respondent brought a third party action against Petitioner setting forth identical theories of liability to those Respondents had asserted in the Massachusetts state court action against Petitioner. Judge Francis dismissed the first Southern District action after he had granted summary judgment in favor of the Respondents on Petitioner's Federal Copyright claims as against Respondents. Those copyright claims were the only basis for federal jurisdiction, and, after dismissing them, Judge Francis declined ancillary jurisdiction over Respondent's third party claims against Petitioner. Judge Francis dismissed those claims without prejudice, obviously leaving the door open for Respondent to re-assert them in a state court.

We set forth this procedural history here to show that the instant case is a continuation of the 1993 Federal Third Party case and that since, as we are asserting, Petitioner would have been estopped from asserting *res judicata* as a defense in the 1993 Federal Third Party action against him based on the *Calderon Rosado* rule, he is likewise estopped from asserting this defense in the 1995 action.

> purpose is not operative when a defendant agrees, expressly or impliedly, to split the claim. This fact is recognized by the Restatement (Second) of Judgments, which authorizes multiple actions on the same claim when "the parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein". While it is unlikely that a defendant would surrender an absolute defense such as claim preclusion following a judgment in his or her favor, agreements to that effect are sometimes made as part of a consent decree or settlement in the initial case. ***The issue of whether the parties agreed to a splitting of plaintiff's claims is resolved by application of basic contract interpretation principles to determine the intent of the parties.***

(Emphasis added). *See Moore's Federal Practice* § 131.24(1).

Hence, the Court of Appeals had relevant precedent for its decision and, in fact, no conflicts exist between that decision and the Court of Appeals decisions which Petitioner cites under Point I of his brief, because of the material factual differences between those cases and this one.

III.

POINT II OF THE PETITION FOR CERTIORARI ADVANCES A SPECIOUS ARGUMENT WHICH THIS COURT SHOULD DISREGARD.

Petitioner puts forth a specious argument in Point II of his brief (at p. 16). In response to the argument so advanced, Respondents point out that, here, if the Massachusetts Court had entered a judgment stating that Respondent was precluded

from bringing the same claim in any court in the State of Massachusetts, but was not precluded from bringing the claim in any court outside of the state of Massachusetts, then any court outside of the State of Massachusetts would be bound to give the stipulation Full Faith and Credit; that is, a state outside of Massachusetts would allow the claim to be brought in its courts. In other words, all other states would, under the Full Faith and Credit Clause, be bound to give the stipulation the meaning it **expresses**. What is at issue in this case, and what the Court of Appeals decided, is what the stipulation at issue **expresses**, that is, the extent of its preclusive effect. A stipulation which unambiguously expressed the intentions of the parties here--that Respondent be allowed to continue its claim in the New York Federal Court — would certainly not have been a basis for a New York Federal Court to dismiss had Petitioner raised *res judicata* objections based on that stipulation, directly following its filing. Petitioner certainly realizes this. Petitioner is playing a semantic game in his argument under this point which is unnecessary and a waste of this Court's time.

IV.

PETITIONER'S ARGUMENT UNDER POINT III OF THE PETITION FAILS.

Petitioner's argument under Point III of his petition similarly begins with an unwarranted conclusion.

Under this point Petitioner argues that the Second Circuit's conclusion that Massachusetts law would allow a court to ascertain the intent of the parties to the stipulation at issue conflicts with federal law. However, Petitioner then fails to explain just **how** this conclusion of the Second Circuit conflicts with "federal law".

As shown under Point I of this brief, because of the particular facts in this case, and because those facts differ from those in the cases Petitioner cites under Point III of his brief, decisions by other circuit courts, as well as by the Second Circuit, do not conflict with the Second Circuit's decision in the instant case. Indeed, throughout his argument under Point III of his petition, Petitioner confuses the application of *res judicata* principles under or using "Federal law", with the method by, and therefore, the laws under which, a given court will determine whether *res judicata* exists in the first place, whether those be federal laws or state laws. Ultimately, under any set of facts, a court will find, no matter whether they are using a rule of law of a given state, or a federal rule of law, that either there is a final judgment in an action, or there is not.

Any body of federal *res judicata* law (or "federal *res judicata* rules" as Petitioner has put it) would address the issue of the effects of a judgment which a court has found or declared to be final. That is, such a set of rules addresses the extent to which a judgment which the court has accepted is a final adjudication on the merits will preclude one party to that judgment from bringing further legal action against the other party. Pertinently, this case has yet to be heard "on the merits."

Because there is no "conflict" between the Second Circuit decision here, and "federal law", the argument under Point III in Petitioner's brief lacks merit.

CONCLUSION

Because Petitioner has set forth no adequate grounds upon which this Court should grant the Petition for a Writ of Certiorari, Respondent respectfully requests and prays that the Court deny the Petition.

Respectfully submitted,

PHILIP PIERCE
Counsel of Record
JAY D. FISCHER
ANDREW P. ROSS
FISCHER, WEISINGER, CALIGUIRE
PORTER & PIERCE
Attorneys for Respondents
310 Madison Avenue
New York, New York 10016
(212) 545-1921